
OFFICE OF THE CLERK

In the Supreme Court of the United States

J. RICHARD ERNST, WILLIAM T. ERVIN,
JAMES E. WILSON, AND JOHN PATRICK O'BRIEN,

Petitioners

v.

THE MEMBERS OF THE MICHIGAN JUDGES RETIREMENT
BOARD, THE MICHIGAN STATE TREASURER; AND THE
DIRECTOR OF THE MICHIGAN DEPARTMENT OF
MANAGEMENT AND BUDGET OFFICE OF RETIREMENT
SYSTEMS.

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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THE QUESTION PRESENTED FOR REVIEW

May judges who must participate in a State Judges Retirement System and who must contribute 7% of their salary towards funding the plan, bring to the Federal Court for adjudication their claim of denial of Fourteenth Amendment Equal Protection when they do not seek damages, but only equitable relief of enjoining further constitutional violations and restitution of their overpayment into the retirement system?

THE PARTIES TO THE PROCEEDINGS IN THE SIXTH CIRCUIT

The parties to the proceedings in the sixth circuit appear in the caption. The respondents are named here by their office. Their individual names in the court below are:

Jay B. Rising	Treasurer of the State of Michigan, and as such, the Treasurer of the Michigan Judges Retirement System
Christopher M. DeRose	Director, Department of Management and Budget Office and executive secretary of the Retirement System.
George M. Elworth	Member, Michigan Judges Retirement Board. [MJRB]
Mark Haas	Member, MJRB
Alton Davis	Member, MJRB
Francis Spaniola	Member, MJRB
Chris J. Swope	Member, MJRB

PETITION FOR A WRIT OF CERTIORARI

Petitioners J. Richard Ernst, William T. Ervine, James E. Wilson, and John Patrick O'Brien, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this proceeding.

Opinions Below

The opinion in the district court is reported at 225 F. Supp. 2d 78 (2002) under the name *Ernst v Roberts*. In the appendix, it starts at A-59. The opinion of the Court of Appeals is reported at 427 F.3d 351 (6th Cir. 2005) under the name *Ernst v. Rising*. In the appendix, A-1.

Jurisdiction

The opinion and judgment of the Court of Appeals, sitting *en banc*, was entered on October 26, 2005. This petition is timely filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutory And Constitutional Provisions

Reproduced in the appendix are:

Amendment X to the Constitution of the United States.

Amendment XI to the Constitution of the United States.

Amendment XIV to the Constitution of the United States.

42 USC 1983

Statement of the Case

Four state judges from Michigan filed this lawsuit in federal district court under 42 U.S.C. § 1983, the Equal Protection Clauses of the United States and Michigan Constitutions, and Michigan common law, claiming that state-court judges, particularly those sitting in the 36th District Court in Detroit,, receive more favorable retirement treatment than state-court judges sitting elsewhere.

Plaintiffs are required to contribute 7% of their salary to the judicial retirement fund. Other judges, primarily 36th district court judges, pay only 3.5% of their salary to the fund. In addition, the retirement benefits are enhanced for the favored judges.¹

Plaintiffs brought the lawsuit on behalf of themselves and other similarly situated judges, about 950 both active and retired judges. They named the members of the Michigan Judges Retirement Board [MJRB] and two ex officio members as defendants.

Plaintiffs did not seek damages. They confined their request for relief to equitable claims--injunctive relief against future violations of Equal Protection and restitution of their overpayment.

Defendants moved to dismiss for sundry reasons including a claim that the 10th and 11th Amendments to the Constitution of the United States deprived the federal court of jurisdiction over plaintiffs' complaint.

¹The disparate treatment began with court reorganization in 1996-97. The State went from a defined benefit retirement plan--tier one--to a defined contribution plan--tier two. Plan participants made an election by 1998 whether to continue in tier one or join the newbies in tier two. The fine details are irrelevant to the issue here.

The district judge ruled that the MJRB was an arm of the State and, therefore, immune from suit in federal court because of the 11th amendment. Sitting en banc, the court of appeals, by a vote of 8 to 5, affirmed the district judge.²

Reasons for Granting the Writ

The district judge thought the issue presented was important enough to direct publication of his opinion. The court of appeals granted a rehearing en banc, indicating that it thought the issue was of "exceptional importance" FRAP 35. This Court should not lightly disregard the concurrent assessment of the issue by both lower courts.³

Petitioners are not seeking consequential damages; their claim is purely equitable. First, they want an injunction to prevent the unconstitutional retirement scheme from continuing indefinitely. While the courts cannot control the exercise of the discretion of an executive officer, an injunction preventing such officer from enforcing an unconstitutional statute is not an interference with his discretion. *Ex Parte Young*, 209 U.S. 123 (1908).

Second, petitioners seek restitution of the excess contributions imposed upon them by the unconstitutional retirement scheme. This is not a claim for damages, but a claim for equitable relief--the return of what rightfully belongs to them.

²Except on some matters not material here.

³Cf. *Easley v. Cromartie*, 532 U.S. 234, 242-43. (2001). This Court just decided a closely related issue under the ADA. *Goodman v. Georgia*, ____ US ____, decided January 10, 2006.

Traditional contract law recognizes the important distinction,⁴ though restitution is usually some form of quasi contract or unjust enrichment. In ERISA litigation, see *Aetna Health Inc. v. Davila*, 542 U.S. 200, 222-23 (2004)

In reviewing this dismissal for lack of federal jurisdiction, we look to the plaintiffs' complaint for the facts.

The chances of the State of Michigan ever having to dip into the general fisc to pay a judgment in favor of petitioners are slim and none and the eponymous Slim has left town.

According to the latest annual report of the tier 1 plan⁵, the excess contributions were 34% of the assets of the fund--\$109,000,000 of the plans \$320,346,000 in assets. See ¶ 80 of the complaint. [JA 00029]⁶ If even one penny of an award of petitioners' claim for restitution came out of the general fisc, it would mean somebody had not kept the system's assets in trust as the statute requires. id. ¶78

The seven per cent "levy" on the still-active petitioners' salary continues to overfund to the extent that in the three fiscal years preceding the lawsuit, the State of Michigan's contributions have been only de minimis and contributions from the court filing fees was zero for the same three year period. id. ¶81.

This Court is being asked only to decide a narrow, but extremely important jurisdictional issue. The details of

⁴Restatement of Contracts, second, § 344.

⁵Remember tier 1 is a defined benefit plan that is being phased out in favor of tier 2 defined contribution.

⁶JA = Joint appendix in the court of appeals.

satisfying petitioners' claim of restitution, if they establish it should be left to a trial judge.

Relief Requested

Petitioners pray that the writ be granted to examine the important issue tendered to the Court

January 23, 2006

Philip A. Gillis
Attorney for petitioners

Appendix

ERNST v. RISING, 427 F.3d 351 (6th Cir. 2005)

J. Richard ERNST, William T. Ervin, James E. Wilson, and John Patrick O'Brien, on behalf of themselves and all others similarly situated, Plaintiffs-Appellants,

v.

Jay B. RISING, Treasurer of the State of Michigan; Christopher M. DeRose, Director, Department of Management and Budget Office of Retirement Systems; George M. Elworth, Member, Michigan Judges Retirement Board; Mark Haas, Member, Michigan Judges Retirement Board; Alton Davis, Member, Michigan Judges Retirement Board; Francis Spaniola, Member, Michigan Judges Retirement Board; and Chris J. Swope, Member, Michigan Judges Retirement Board, Defendants-Appellees.

No. 02-2287.

United States Court of Appeals, Sixth Circuit.

Argued: June 1, 2005.

Decided and Filed: October 26, 2005.

Appeal from the United States District Court for the Eastern District of Michigan, Bernard A. Friedman, J.

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ARGUED: Kenneth A. Flaska, Dawda, Mann, Mulcahy & Sadler, Bloomfield Hills, Michigan, for Appellants. Larry F. Brya, Office of the Attorney General, Lansing, Michigan, for Appellees. ON BRIEF: Chester E. Kasiborski, Jr., Bernardi,

Ronayne & Glusac, Detroit, Michigan, for Appellants. Larry F. Brya, Office of the Attorney General, Lansing, Michigan, for Appellees.

Before: BOGGS, Chief Judge; MARTIN, SUHRHEINRICH, BATCHELDER, DAUGHTREY, MOORE, COLE, CLAY, GILMAN, GIBBONS, ROGERS, SUTTON, and COOK, Circuit Judges.

SUTTON, J., delivered the opinion of the court, in which BOGGS, C.J., SUHRHEINRICH, BATCHELDER, GILMAN, GIBBONS, and COOK, JJ., joined and in which ROGERS, J., joined as to Parts I-III and V, and dissented from Part IV.

CLAY, J., (pp. 373-81), delivered a separate dissenting opinion, in which MARTIN, DAUGHTREY, MOORE, and COLE, JJ., joined and in which ROGERS, J., joined as to Part II only.

OPINION

SUTTON, Circuit Judge.

Four state-court judges from Michigan filed this lawsuit under 42 U.S.C. § 1983, the Equal Protection Clauses of the United States and Michigan Constitutions, and Michigan common law, claiming that state-court judges based in Detroit and surrounding Wayne County (the 36th District) receive more favorable retirement benefits than state-court judges based elsewhere in the State. They brought the lawsuit on behalf of themselves and other similarly situated state-court judges; they filed the lawsuit in federal court; and they named several state officials, all with various responsibilities for managing the retirement system, in their official capacities as defendants Page 355 ("the State" or "state defendants"). Among other forms of relief, plaintiffs

asked the state defendants to "make restitution . . . by paying . . . with interest" the difference between the retirement benefits they received and the amounts they would have received had they been treated like the 36th-District judges.

The primary issue joined by the parties is whether a government retirement system that provides benefits for all state judges (and many other state officials) is an "arm of the State" or a "political subdivision" of the State. If the retirement system is an arm of the State, the parties agree, a federal-law money-damages action (or a state-law action of any sort) against the retirement system or its officials may not proceed in federal court in light of the Tenth and Eleventh Amendments to the United States Constitution. If the retirement system is a political subdivision of the State, the parties also agree, a money-damages action of this sort may proceed in federal court.

As we see it, the retirement system is most naturally characterized as an arm of the State. It is a product of state legislation. It ~~is~~ run by state officials or individuals appointed by state officials. It serves state officials — not just all state-court judges in Michigan but many of the top government officials in the State (e.g., the governor, the lieutenant governor, the secretary of state, the attorney general). It is funded by the state treasury as well as by contributions from state officials. And if the retirement system faces a monetary shortfall, state legislation requires the state treasurer to make up the difference with state funds. For these reasons and those elaborated below, the district court correctly characterized the retirement system as an arm of the State. Because plaintiffs have filed only federal claims that seek monetary relief or claims that primarily seek monetary relief and because the state-law claims must be dismissed regardless of the type of relief they seek, the

district court correctly dismissed all claims. To the extent the district court meant to dismiss any of plaintiffs' claims with prejudice, however, that was error, and that portion of the order is reversed.

I.

In 1992, the Michigan legislature enacted the Judges Retirement Act, Mich. Comp. Laws §§ 38.2101-.2670, which established the judges' retirement system in its current form. The retirement system provides defined-benefit and defined-contribution plans for most of Michigan's state-wide officials: state trial judges (which include probate judges, district court judges and circuit court judges), state intermediate appellate judges, state supreme court justices, the governor, the lieutenant governor, the secretary of state, the attorney general, the legislative auditor general and the constitutional court administrator. Id. § 38.2108.

The retirement system is managed by a board comprised of two state officials (the treasurer and the attorney general) and three appointees named by the governor with the advice and consent of the state senate. Id. § 38.2202(1). The state treasurer serves as the treasurer of the retirement system, id. § 38.2206(1); the state attorney general serves as the legal advisor to the retirement system, id. § 38.2207; and another state entity (the Michigan Department of Management and Budget) has responsibility "for the budgeting, procurement, and related management functions" of the retirement system, id. § 38.2205.

As amended by legislation enacted in 1996, the retirement system offers all members benefits under one of two pension plans: a defined benefit plan called "Tier 1" and a defined contribution plan Page 356 called "Tier 2." Under both tiers, participating officials contribute a portion of their income to